No. 94-1381

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

DAVIDSON BROS., INC., a New Jersey Corporation,

Petitioner,

vs.

D. KATZ & SONS, INC., a New Jersey Corporation, CITY OF NEW BRUNSWICK, a Municipal Corporation, C-TOWN, a Division of Krasdale Foods, Inc., and NEW BRUNSWICK HOUSING AUTHORITY, a Body Corporate and Politic,

Respondents.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION FOR RESPONDENTS D. KATZ & SONS, INC., A NEW JERSEY CORPORATION, CITY OF NEW BRUNSWICK AND NEW BRUNSWICK HOUSING AUTHORITY

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STATEMENT OF JURISDICTION

The decision of the Superior Court of New Jersey, Appellate Division, was rendered on June 23, 1994. The Supreme Court of New Jersey denied the Petitioner's Petition for Certification on November 16, 1994. The Petitioner has cited 28 U.S.C. § 1257 as the grounds on which the jurisdiction of this Court is invoked. The Respondents submit that none of the bases set forth in 28 U.S.C. § 1257 for certiorari review of a judgment rendered by the highest court of a state are present in this case. The final judgment of the Supreme Court of New Jersey raises no federal issue.

STATEMENT OF THE CASE

As the Supreme Court of New Jersey noted in its 1990 decision in this case, the basic underlying facts concerning the transactions among the parties are not in dispute. *Davidson Bros., Inc. v. D. Katz & Sons, Inc.*, 121 N.J. 196, 579 A.2d 288, 289 (1990) (Pet. App. 35a). The court summarized these facts in its opinion. 579 A.2d at 289-90 (Pet. App. 35a-36a). To the extent that the Petitioner has set forth these undisputed facts, the Respondents agree with such statements and incorporate them here by reference.

The Petitioner's Statement of the Case also contains many argumentative statements, set forth at great length, which are improper in light of Supreme Court Rule 14.1(g). That Rule requires a concise statement of material facts. The Respondents expressly disagree with, and do not incorporate here, those parts of the Petitioner's Statement of the Case which constitute argument rather than a concise summary of the facts.

In addition to the evidence described in an argumentative fashion in the Petitioner's Statement of the Case, the Respondents offered at trial the testimony of a number of

witnesses who testified in detail concerning the need for a supermarket in the community immediately surrounding the George Street location, the injurious effects of the Petitioner's closure of its store at that location and of the 40-year restrictive covenant on that property, and the inability of the City of New Brunswick to secure another location for a supermarket in the same area.

Such evidence included testimony from: Richard Keefe, former Executive Director of the New Brunswick Housing Authority; John Lynch, former Mayor of New Brunswick; Andre Byrom, Beatrice Harris, Mary Hush and the Reverend Oren Hardgrove, residents and/or community leaders in the area around the George Street property; Glenn Patterson, Director of Policy and Development for the City of New Brunswick, and Dr. James O'Connor, an expert in food marketing. Davidson Bros. presented no witnesses on the issues of public need for a supermarket at the George Street site and/or the restrictive covenant's interference with the public interest in meeting that need.

Contrary to an assertion in the Petitioner's Statement of the Case (Petition for Writ of Certiorari 15), the Superior Court, Appellate Division decision in this case mentioned and took into account the eight factors which the Supreme Court of New Jersey had set forth for determining the reasonableness of the restrictive covenant under state law (Pet. App. 5a).

A statement in the Petitioner's Statement of the Case suggests inaccurately that the Appellate Division approved of "the taking of the covenant without compensation" (Petition for Writ of Certiorari 16). In fact, as the Petitioner has stated on the preceding page (p. 15) of the Petition for Writ of Certiorari, the Appellate Division made no mention of a takings issue, because that issue was not before it.

SUMMARY OF THE ARGUMENT

There are no special and important reasons for granting the Petition for Writ of Certiorari in this case. The decisions by the state courts, including the Supreme Court of New Jersey, rest exclusively on a nonfederal ground, the invalidity of the restrictive covenant under the reasonableness test adopted in New Jersey (Pet. App. 44a-46a).

The Petitioner also failed to raise a federal issue in a timely and proper fashion. No federal issue was pleaded in Petitioner's original Complaint, nor did it amend or even seek leave to amend that Complaint to include a federal question.

The decision by the Supreme Court of New Jersey is not in conflict with decisions of the Supreme Court of the United States, a United States court of appeals or another state court of last resort.

The Petitioner has not suffered the taking of property without compensation in violation of a federal constitutional right. Since the restrictive covenant is invalid and unenforceable under state law, it is not a property right, the loss of which must be compensated. In addition, invalidation of the restrictive covenant does not cause a compensable taking because such a result is proportional to the injurious effects of the covenant on public interests.

REASON FOR DENYING THE WRIT

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE DECISIONS OF THE NEW JERSEY COURTS INVOLVE NO FEDERAL ISSUE AND ARE NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT, A FEDERAL COURT OF APPEALS, OR A STATE COURT OF LAST RESORT.

The Supreme Court will grant a petition for writ of certiorari only when there are "special and important reasons" for doing so. Sup. Ct. R. 10.1. Respondents respectfully submit that there are no such reasons in this case.

In the circumstances presented here, where the highest court of a state has denied certification of an appeal without stating any ground for its decision, the Supreme Court must ascertain whether that court's decision might have rested on a non-federal ground, "for if it did we must decline to take jurisdiction." *Ellis v. Dixon*, 349 U.S. 458, 459 (1955) (citing *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952)). In this case, the Court should decline to take jurisdiction, because the *only* grounds properly raised before, and decided on by, the state courts were non-federal grounds.

A principal purpose for this Court's exercise of its certiorari jurisdiction is to resolve conflicts among the circuit courts of appeals and state courts concerning the meaning of provisions of federal law. *Braxton v. United States*, 500 U.S. 344 (1991). This consideration is embodied in Supreme Court Rule 10.1(b), which, in pertinent part, refers to cases in which a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. Rule 10.1(b) does not apply to this case. The Supreme Court of New Jersey did not decide a federal

question at all (Pet. App. 1a, 32a). Nor, for that matter, did the Appellate Division or the Law Division of the Superior Court of New Jersey decide a federal question (Pet. App. 2a, 15a). Each of these state courts had before them, and rendered decisions on, only the state law issues concerning whether the restrictive covenant at issue in this case was contrary to the public interest, unreasonable, and hence, unenforceable.

The federal issue asserted by Petitioner is the takings issue. Although the Petitioner commenced this action with a Complaint filed in June of 1986, no takings issue was pleaded in the original Complaint (Res. App. 1a-8a) or the Amended Complaint (Res. App. 9a-14a), nor did Petitioner ever amend or seek leave to amend that Complaint to include a takings question or any federal question. The Petition indicates that the Petitioner obliquely referred to the takings question for the first time seven years later, in a trial brief and at oral argument at the trial following remand in January 1993. In fact, the takings argument was used by Petitioner only after Justice Pollock's concurrence in the New Jersey Supreme Court decision. At that point, the case had already been appealed through the state courts to the Supreme Court of New Jersey, which remanded the case to the trial court for determination of the reasonableness of the restrictive covenant. Four of the six participating justices did not endorse Justice Pollock's position.

Moreover, the Petitioner did not raise the takings issue in its Plaintiff-Appellant's Brief filed with the Appellate Division after the 1993 trial. Where a federal constitutional question was not properly raised in state court proceedings, the question is not open for a decision by the Court in a proceeding on a petition for certiorari. *Ellis v. Dixon, supra,* 349 U.S. at 460.

Even assuming there was a state court decision on a question of federal law, Rule 10.1(b) still does not apply because there is

no conflict between the state courts' decisions in this case and a decision of another state court of last resort or of a United States court of appeals. The decisions cited by the Petitioner are either not on point with the facts of this case or were decided on the basis of questions of state law concerning the validity and enforceability of restrictive covenants, not the federal taking issue which the Petitioner wishes this Court to consider (Petition for Writ of Certiorari 22-23).

There are other decisions, not cited by the Petitioner, in which courts have invalidated restrictive covenants because of injury to public interests which were closely akin to the public interests which were present in this case. Courts have not allowed restrictive covenants to thwart the substantial public interests in favor of insuring adequate public roads, *see Anderson v. Lynch,* 188 Ga. 154, 3 S.E. 2d 85 (1939), or those in favor of providing the basic necessities of life to another group of disadvantaged citizens, the mentally or developmentally disabled. *See Westwood Homeowners Association v. Tenhoff,* 155 Ariz. 229, 745 P.2d 976 (1989); *Craig v. Bossenbery,* 134 Mich. App. 543, 351 N.W. 2d 596 (1984); *Deep East Texas Regional Mental Health & Mental Retardation Services v. Kinnear,* 877 S.W. 2d 550 (Tex. Ct. App. 1994) (restrictive covenants preventing use of property in residential area as a home for the mentally retarded held invalid because of public policy to promote the public welfare of mentally retarded citizens and to provide services to them in their own communities).

The restrictive covenant in this controversy was found to be invalid and unenforceable because it was unreasonable in its duration, restrained trade and adversely impacted upon public interest and public need (Pet. App. 30a). The trial judge further determined that there was insufficient evidence in the record on remand to establish changed circumstances in the neighborhood from the date the covenant was imposed (Pet. App. 30a), thereby

indicating that the covenant was invalid from its inception. Thus, the involvement of a branch of government in this controversy can not convert the matter to a "taking," for the covenant would have been unenforceable against any successor-in-interest to D. Katz & Sons, Inc.

Since this case involves no decision by a state court on a question of federal law, Rule 10.1(c), the only other possibly applicable part of Rule 10.1, also does not apply. Rule 10.1(c) refers in pertinent part to a state court decision on "an important question of federal law which has not been, but should be, settled by this Court, or to such a decision, on a federal question, which "conflicts with applicable decisions of this Court." In any event, the federal question posed in the Petition for Writ of Certiorari is not an important and unsettling one requiring a decision by this Court, nor would resolution of that question in the Respondents' favor conflict with precedents of this Court.

The New Jersey Superior Court, Appellate Division, whose decision was left undisturbed by the Supreme Court of New Jersey, properly held on the basis of the facts before it, and the law established by the Supreme Court of New Jersey in this very case, that the restrictive covenant was unreasonable and unenforceable under state law (Pet. App. 2a). Accordingly, under state law, the Petitioner has no property interest in the covenant, the loss of which could give rise to an argument based on a taking without compensation. In describing the federal district court case on which it relies most heavily, the Petitioner has referred to that court's observation that the meaning of "property" as used in the Fifth Amendment normally is derived from local or state law (Petition for Writ of Certiorari 18). *See United States v. Certain Lands in City of Augusta,* 220 F. Supp. 696, 699 (D. Me. 1963) (*citing, United States ex rel. Tennessee Valley Authority v. Powelson,* 319 U.S. 266, 279 (1943); *United States v. Causby,* 328 U.S. 256, 266 (1946)). Where, as here, there is no enforceable

property right under state law, there can be no compensable taking. The several federal court cases relied on by the Petitioner (Petition for Writ of Certiorari 18-20) are distinguishable from this case in that they involved restrictive covenants, the validity of which under state law had not even been questioned, much less decided in the negative by a state's highest court.

Even assuming only for argument's sake that the restrictive covenant is a valid, enforceable property interest under state law, the loss of which could support a takings argument, the decisions by the state courts in this case are not in conflict with this Court's precedents in this area of the law. The principles of law from the court's most recent takings case, *Dolan v. City of Tigard,* 114 S. Ct. 2309 (1994), when applied to this case, show that no taking has occurred. In *Dolan,* the Court ruled that a restriction on land use (in that case, a requirement that land be dedicated for public use as a condition for a permit) must satisfy two requirements to withstand scrutiny under a takings analysis. First, there must be an "essential nexus" between a legitimate state interest and the restriction imposed by the state. *Id.* at 2317. If such a nexus exists, there must be "rough proportionality" between the nature and extent of the restriction and the impact of the land-owner's use of his property.

As the Appellate Division observed at some length (Pet. App. 6a-14a), the evidence in this case showed a close connection between invalidation of the restrictive covenant and advancing the clearly legitimate state interest in redevelopment and revitalization of the affected area in which the property is situated. Moreover, the invalidation of the restrictive covenant is commensurate with the adverse impacts on the surrounding community, which would be certain to occur if the covenant was to be given effect. More than mere "rough proportionality," there is a very close fit between the injurious effects of the restrictive covenant on the public interest and the remedy which has been tailored to avoid those effects.

The Petitioner has mischaracterized the decisions in this case by the courts of New Jersey as following a rule which would invalidate any restrictive covenant that in some way interferes with a governmental function (Petition for Writ of Certiorari 20). On the contrary, this case is about a restrictive covenant which was properly held invalid under state law because it was contrary to the public interest of providing basic necessities of life to residents of a community in imminent danger of losing them. This decision was reached only after an extensive trial, and after careful application of the eight-part reasonableness test articulated by the Supreme Court of New Jersey when this case first came before that court (Pet. App. 45a-46a). The New Jersey Superior Court, Appellate Division, expressly referred to this reasonableness test, giving appropriate emphasis to factor seven, concerning a covenant's adverse impact on the public interest (Pet. App. 6a, 13a-14a). Most of the evidence at trial related to, and had shown the existence of, such injury to the public interest (Pet. App. 23a-27a, 30a). The Petitioner presented no evidence to refute the showing that the restrictive covenant severely interfered with the public interest in providing a means by which low-income and elderly residents of the area in question could obtain basic necessities.

The ruling by the trial court and the Appellate Division certainly does not mean, as Davidson Bros. contends, that restrictive covenants against competition will become meaningless and unenforceable in virtually every case. Rather, the lower court decisions in this case were governed very much by the particular facts of this case. Only in those New Jersey cases where the facts similarly show covenants which fail the reasonableness test will the covenants be vulnerable to a judicial finding that they are invalid and unenforceable under state law.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — VERIFIED COMPLAINT FILED JUNE 16, 1986

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Attorneys for Plaintiff

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX COUNTY
DOCKET NO. C-3734-86

Civil Action

DAVIDSON BROS. INC., a New Jersey Corporation,

Plaintiff,

-vs-

D. KATZ & SONS INC., a New Jersey Corporation; CITY OF NEW BRUNSWICK, a Municipal Corporation; and C-TOWN, A Division of Krasdale Foods, Inc., a New York Corporation,

Defendants.

VERIFIED COMPLAINT

DAVIDSON BROS. INC., a New Jersey Corporation, having a place of business at 850 U.S. Highway #1, North Brunswick, New Jersey, by way of Complaint against defendants, says:

Appendix A

FIRST COUNT

1. Plaintiff, Davidson Bros. Inc., presently operates a Foodtown supermarket at 20 Elizabeth Street, New Brunswick, New Jersey.

2. Prior to on or about September 8, 1980, plaintiff and Irisondra, Inc., ("Irisondra"), a related New Jersey corporation, owned certain premises located at 263-271 George Street, New Brunswick, New Jersey, and 30 Morris Street, New Brunswick, New Jersey, known as Lots 9.1, 10, 13, 14, 15 and 17.02 in Block 120, and Lots 16 & 17 in Block 120, respectively, on the Tax Map of the City of New Brunswick.

3. On or about September 8, 1980, plaintiff and Irisondra conveyed title to the premises at 263-271 George Street and 30 Morris Street to defendant D. Katz & Sons ("Katz"), a New Jersey Corporation, by Bargain & Sale Deeds, which deeds were recorded in the Middlesex County Clerk's Office, at Book 3157, Page 811 & Book 3157, Page 817, on September 10, 1980. True copies of said Deeds are annexed hereto as Exhibits A & B respectively and made a part hereof.

4. The Contracts of Sale between plaintiff and Katz, and between Irisondra and Katz, as well as the Deed from plaintiff to Katz and the Deed from Irisondra to Katz, contain the following restriction:

> "V. Lands and premises described herein and conveyed hereby are conveyed subject to the restriction that said lands and premises shall not be used as and for a supermarket or grocery store of a supermarket type, however

designated, for a period for forty (40) years from the date of this Deed. This restriction shall be a convenant attached to and running with the lands."

5. Said restriction was intended by all of the parties to inure to the benefit of plaintiff.

6. On or about March 11, 1986, defendant City of New Brunswick announced its intention to purchase the premises at 263-271 George Street and 30 Morris Street and to lease said premises to defendant C-Town for a period of five (5) years, rent free, for use as a food market, including meat and produce, delicatessen, housewares and health & beauty departments, and a full line of groceries. A true copy of a newspaper report, dated March 12, 1986, is annexed hereto as Exhibit C and made a part hereof.

7. On or about March 11 and March 12, 1986, plaintiff, through its attorneys, advised defendants, D. Katz & Sons, Inc., City of New Brunswick and C-Town that the proposed transaction, pursuant to which the premises would be utilized as a food market, constituted a violation of the restrictive covenant contained in the deeds to said premises. True copies of such letters are annexed hereto as Exhibits D, E & F respectively and made a part hereof.

8. The supermarket currently owned and operated by plaintiff is located at the intersection of Livingston Avenue and Elizabeth Street, New Brunswick, New Jersey, and is approximately two miles away from the subject premises. The trading area of plaintiff's supermarket encompasses that portion of New Brunswick which would also be the trading area of the proposed C-Town.

9. The proposed use of the subject premises for a C-Town, in direct competition with plaintiff's present supermarket would result in an irreparable and permanent injury to plaintiff's business which could not be measured or compensated in money damages.

10. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff demands judgment against defendants:

A. Preliminarily and permanently restraining and enjoining defendants from in any manner utilizing the subject premises in violation of the terms of the restrictive convenant contained in the deeds from plaintiff and Irisondra to defendant, D. Katz & Sons, Inc.;

B. Declaring said restrictive covenant to be valid and binding upon defendants and upon any and all subsequent owners of the premises during the period of the restrictive covenant;

C. For compensatory and punitive damages;

D. For interest and costs of suit;

E. For such other relief as the Court deems just and proper.

SECOND COUNT

1. Plaintiff repeats and realleges each and every allegation contained in the First Count as if set forth at length herein.

2. Defendants, on information and belief, propose to lease

the subject premises to defendant C-Town, rent-free, for five years in order to give C-Town a competitive advantage relative to plaintiff and other supermarkets in the area.

3. The proposed lease of said premises, rent-free, to C-Town constitutes the giving of money or property to or in aid of a private corporation, and a donation of land or appropriation of money by a municipal corporation to or for the use of a private corporation, contrary to the provisions of Article 8, Section 3, Paragraphs 2 and 3 of the New Jersey Constitution.

4. Said illegal gift to defendant C-Town will result in irreparable and permanent injury to plaintiff's existing business, which injury could not be measured or compensated in money damages.

5. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff demands judgment against defendant City of New Brunswick:

A. Preliminarily and permanently restraining and enjoining defendant City of New Brunswick from leasing, or attempting to lease, the subject premises to any entity for less than fair market rent, or on any other basis which would constitute a gift, donation or appropriation of land or money to any private party.

B. For compensatory damages;

C. For punitive damages;

D. For interests and costs of suit;

E. For such other relief as the Court deems just and proper.

LASSER, HOCHMAN, MARCUS,
GURYAN AND KUSKIN
Attorneys for Plaintiffs

BY: s/ Bruce H. Snyder
BRUCE H. SNYDER

DATED: June 16, 1986

Appendix A

STATE OF NEW JERSEY :
: SS VERIFICATION
COUNTY OF ESSEX :

WILLIAM C. DAVIDSON, of full age, being duly sworn according to law, on his oath deposes and says:

1. I am the Vice President of Davidson Bros. Inc., plaintiff in the within matter, and am personally familiar with the facts set forth herein, and with the books and records of Davidson Bros. Inc. and Irisondra, Inc.

2. I have read the Complaint and the allegations contained therein are true to my personal knowledge, except where information and belief are indicated, and, as to those allegations, I believe them to be true.

s/ William C. Davidson
WILLIAM C. DAVIDSON

Sworn to and Subscribed
before me this 16th
day of June, 1986

s/ Doris L. Ames

DORIS L. AMES
A NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Mar. 9, 1987

Appendix A

CERTIFICATION

I certify that the matter in controversy is not the subject of any other action pending in any other court or of a pending arbitration proceeding, nor is any other action or arbitration proceeding contemplated. I am not aware of any other party who should be joined in this action.

s/ Bruce H. Snyder
BRUCE H. SNYDER

DATED: June 16, 1986

APPENDIX B — AMENDED COMPLAINT FILED FEBRUARY 9, 1987

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX COUNTY
DOCKET NO. C-3734-86

Civil Action

DAVIDSON BROS. INC., a New Jersey Corporation,

Plaintiff,

-vs-

D. KATZ & SONS INC., a New Jersey Corporation; CITY OF NEW BRUNSWICK, a Municipal Corporation; C-TOWN, A Division of Krasdale Foods, Inc., a New York Corporation, and NEW BRUNSWICK HOUSING AUTHORITY, a Body Corporate and Politic,

Defendants.

AMENDED COMPLAINT

DAVIDSON BROS. INC., a New Jersey Corporation, having a place of business at 850 U.S. Highway #1, North Brunswick, New Jersey, by way of Complaint against defendants, says:

Appendix B

FIRST COUNT

1. Plaintiff, Davidson Bros. Inc., presently operates a Foodtown supermarket at 20 Elizabeth Street, New Brunswick, New Jersey.

2. Prior to on or about September 8, 1980, plaintiff and Irisondra, Inc., ("Irisondra"), a related New Jersey corporation, owned certain premises located at 263-271 George Street, New Brunswick, New Jersey, and 30 Morris Street, New Brunswick, New Jersey, known as Lots 9.1, 10, 13, 14, 15 and 17.02 in Block 120, and Lots 16 & 17 in Block 120, respectively, on the Tax Map of the City of New Brunswick.

3. On or about September 8, 1980, plaintiff and Irisondra conveyed title to the premises at 263-271 George Street and 30 Morris Street to defendant D. Katz & Sons ("Katz"), a New Jersey Corporation, by Bargain & Sale Deeds, which deeds were recorded in the Middlesex County Clerk's Office, at Book 3157, Page 811 & Book 3157, Page 817, on September 10, 1980. True copies of said Deeds are annexed hereto as Exhibits A & B respectively and made a part hereof.

4. The Contracts of Sale between plaintiff and Katz, and between Irisondra and Katz, as well as the Deed from plaintiff to Katz and the Deed from Irisondra to Katz, contain the following restriction:

> "V. Lands and premises described herein and conveyed hereby are conveyed subject to the restriction that said lands and premises shall not be used as and for a supermarket or grocery store of a supermarket type, however

designated, for a period for forty (40) years from the date of this Deed. This restriction shall be a covenant attached to and running with the lands."

5. Said restriction was intended by all of the parties to inure to the benefit of plaintiff.

6. On or about March 11, 1986, defendant City of New Brunswick announced its intention to purchase the premises at 263-271 George Street and 30 Morris Street and to lease said premises to defendant C-Town for a period of five (5) years, rent free, for use as a food market, including meat and produce, delicatessen, housewares and health & beauty departments, and a full line of groceries. A true copy of a newspaper report, dated March 12, 1986, is annexed hereto as Exhibit C and made a part hereof.

7. On or about March 11 and March 12, 1986, plaintiff, through its attorneys, advised defendants, D. Katz & Sons, Inc., City of New Brunswick and C-Town that the proposed transaction, pursuant to which the premises would be utilized as a food market, constituted a violation of the restrictive covenant contained in the deeds to said premises. True copies of such letters are annexed hereto as Exhibits D, E & F respectively and made a part hereof.

8. On information and belief, the entity which in fact intends to take title to the subject premises, and to enter into the lease with defendant C-Town, is defendant New Brunswick Housing Authority, a body corporate and politic created pursuant to N.J.S.A. 55:14A-1 *et seq.*, and authorized to carry out redevelopment projects, by the City of New Brunswick, pursuant to N.J.S.A. 55:14A-34.

Appendix B

9. The supermarket currently owned and operated by plaintiff is located at the intersection of Livingston Avenue and Elizabeth Street, New Brunswick, New Jersey, and is approximately two miles away from the subject premises. The trading area of plaintiff's supermarket encompasses that portion of New Brunswick which would also be the trading area of the proposed C-Town.

10. The proposed use of the subject premises for a C-Town, in direct competition with plaintiff's present supermarket would result in an irreparable and permanent injury to plaintiff's business which could not be measured or compensated in money damages.

10. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff demands judgment against defendants:

A. Preliminarily and permanently restraining and enjoining defendants from in any manner utilizing the subject premises in violation of the terms of the restrictive convenant contained in the deeds from plaintiff and Irisondra to defendant, D. Katz & Sons, Inc.;

B. Declaring said restrictive covenant to be valid and binding upon defendants and upon any and all subsequent owners of the premises during the period of the restrictive convenant;

C. For compensatory and punitive damages;

D. For interest and costs of suit;

Appendix B

E. For such other relief as the Court deems just and proper.

SECOND COUNT

1. Plaintiff repeats and realleges each and every allegation contained in the First Count as if set forth at length herein.

2. Defendants, on information and belief, propose to lease the subject premises to defendant C-Town, rent-free, for five years in order to give C-Town a competitive advantage relative to plaintiff and other supermarkets in the area.

3. The proposed lease of said premises, rent-free, to C-Town constitutes the giving of money or property to or in aid of a private corporation, and a donation of land or appropriation of money by a municipal corporation to or for the use of a private corporation, contrary to the provisions of Article 8, Section 3, Paragraphs 2 and 3 of the New Jersey Constitution.

4. Said illegal gift to defendant C-Town will result in irreparable and permanent injury to plaintiff's existing business, which injury could not be measured or compensated in money damages.

5. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff demands judgment against defendant City of New Brunswick:

A. Preliminarily and permanently restraining and enjoining defendant City of New Brunswick and defendant New Brunswick Housing Authority from leasing, or attempting to lease, the subject premises to any entity for less than fair market rent, or on

any other basis which would constitute a gift, donation or appropriation of land or money to any private party.

B. For compensatory damages;

C. For punitive damages;

D. For interests and costs of suit;

E. For such other relief as the Court deems just and proper.

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